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APPELLANT PRO SE:

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ATTORNEYS FOR APPELLEE:

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JUSTIN F. ROEBEL
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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIE RAY LEE,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 21A01-0308-PC-304
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-9606-CF-60

June 7, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Willie Ray Lee (“Lee”) appeals from the Fayette Circuit Court’s denial of his petition for post-conviction relief. He raises two issues, which we restate as:

- I. Whether Lee is entitled to post-conviction relief because jurors were presented with evidence of two incidents of cocaine dealing and may not have rendered a unanimous verdict; and,
- II. Whether Lee was denied effective assistance of appellate counsel.

We affirm.

Facts and Procedural History

On August 13, 1996, Lee was convicted of Class A felony dealing cocaine within 1000 feet of a school and found to be a habitual offender by a jury in Fayette Circuit Court. The trial court sentenced Lee to forty-four years with a thirty-year enhancement for being a habitual offender. Lee appealed his conviction and sentence, and our supreme court affirmed. Lee v. State, 689 N.E.2d 435 (Ind. 1997).

On February 1, 1999, Lee filed a petition for post-conviction relief, asserting ineffective assistance of counsel. On March 19, 1999, a deputy public defender entered an appearance on Lee’s behalf but withdrew his appearance on May 19, 2003. The trial court summarily denied Lee’s petition on July 28, 2003.

Lee filed a pro se notice of appeal on August 20, 2003 and tendered a brief, which was not filed pending the filing of the notice of completion of transcript. This court dismissed Lee’s appeal. Lee filed a pro se petition for rehearing on January 23, 2004. On February 25, 2004, this court ordered Lee’s appeal reinstated, directed Lee to file an amended notice of appeal indicating that no transcript was requested, and ordered the Fayette County Clerk to issue an amended notice of completion of clerk’s record.

Lee filed his appellant's brief on April 20, 2004. The State failed to submit an appellee's brief. The State later requested permission to respond to Lee's brief and that the proceedings be remanded to the trial court for an evidentiary hearing. On August 24, 2004, this court granted the State's Motion for Late Response and Motion for Remand for an Evidentiary Hearing.

On January 7, 2005, Lee filed an amended petition for post-conviction relief along with a supporting memorandum of law. The post-conviction court conducted a hearing over three days and then issued findings and conclusions denying Lee's petition on January 17, 2006.

On February 16, 2006, Lee filed a notice of appeal. The trial court clerk filed the notice of completion of clerk's record on February 17, 2006, and the notice of completion of transcript on October 20, 2006. Lee sought and was granted four extensions of time within which to file his appellant's brief. He now appeals the denial of his petition for post-conviction relief.

Standard of Review

Post-conviction procedures do not afford petitioners an opportunity for a "super appeal." Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post-Conviction Rule 1(1). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When

appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

Discussion and Decision

First, Lee argues that he “was denied a fair trial and due process of law when the [c]ourt allowed the jury to hear evidence of two separate episodes of dealing in cocaine when Lee was charged with only one.” Br. of Appellant at 4. Lee cites Castillo v. State, 734 N.E.2d 299, 303-304 (Ind. Ct. App. 2000), summarily aff’d, 741 N.E.2d 1196 (Ind. 2001), and contends that it was error to allow the jury to hear evidence of two separate episodes of dealing in cocaine when he was charged with only one. He further contends that the trial court should have instructed the jury that they were required to unanimously agree upon which act supported the conviction for dealing in cocaine. However, in contrast to the situation presented in Castillo, Lee was specifically charged with dealing cocaine to James Napier. Appellant’s App. p. 9. Therefore, there was no possibility that the jury’s verdict was not unanimous.

Moreover, Lee raised the argument that the trial court impermissibly admitted evidence of two separate episodes of cocaine dealing in his direct appeal and lost. See Lee v. State, 689 N.E.2d 435, 438-39 (Ind. 1997).

Next, Lee argues that he received ineffective assistance of appellate counsel. He contends that “[a]ll of the claims raised in Lee’s direct appeal were weak.” Br. of Appellant at 7. We review claims of ineffective assistance of appellate counsel using the

same standard applicable to claims of trial counsel ineffectiveness. Fisher v. State, 810 N.E.2d 674, 676 (Ind. 2004) (citing Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000)). The defendant must show that appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Id. at 677. Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Id. (citing Bieghler v. State, 690 N.E.2d 188, 193-95 (Ind. 1997)).

Lee contends that his appellate counsel was ineffective because he failed to raise the argument Lee advances above. However, as noted above, appellate counsel did present as an issue for appeal the admission of evidence of uncharged conduct. See Lee, 689 N.E.2d at 438-39. Lee fails to convince us that his counsel was deficient.

For these reasons, we affirm the denial of Lee's petition for post-conviction relief.

Affirmed.

BARNES, J., and CRONE, J., concur.